United Nations A/C.5/63/9

General Assembly

Distr.: General
27 October 2008

Original: English

Sixty-third session
Fifth Committee
Agenda item 129
Administration of justice at the United Nations

Letter dated 27 October 2008 from the President of the General Assembly to the Chairman of the Fifth Committee

I have the honour to transmit herewith a letter from the Chairman of the Sixth Committee dated 24 October 2008 with regard to agenda item 129 (see annex).

(*Signed*) Miguel **d'Escoto Brockmann**

08-57188 (E) 301008

Annex

Letter dated 24 October 2008 from the Chairman of the Sixth Committee to the President of the General Assembly

I have the honour to write to you with regard to agenda item 129, "Administration of justice at the United Nations".

As you are aware, at its 2nd plenary meeting, on 19 September 2008, the General Assembly decided to allocate this item to the Fifth Committee and to the Sixth Committee pursuant to its resolution 62/228 and its decision 62/519.

During the present session, the Sixth Committee has considered this item in plenary at its 1st and 15th meetings, on 6 and 24 October 2008, as well as in the form of a working group. The Sixth Committee has adopted the text of the draft statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal (with bracketed unagreed text) (see enclosures 1 and 2).

I should draw your attention to certain specific issues relating to the text of the draft statutes, as adopted by the Sixth Committee.

With respect to the persons that may file applications to the Dispute Tribunal (see article 3, paragraph 1, of the draft statute of the Dispute Tribunal), the Sixth Committee has included possible options in appendix II to the draft statute of the Dispute Tribunal.

The Sixth Committee has further considered that a number of matters relating to the draft statutes should be decided by the General Assembly following the recommendation of the Fifth Committee. The Sixth Committee has included, either in footnotes to the draft statutes or in appendixes thereto, observations on the legal aspects of such matters. These matters are the following:

(a) The question of whether the Dispute Tribunal shall be competent to hear and pass judgement on an application by a staff association to enforce its rights as recognized under the Staff Regulations and Rules (see articles 2, paragraph 3, and 3, paragraph 3, of the draft statute of the Dispute Tribunal);

(b) Arrangements concerning the transition of cases filed before 1 January 2009 from the current system of administration of justice to the new system (see articles 2, paragraph 7, and 8, paragraph 7, of the draft statute of the Dispute Tribunal and appendix I thereto);

(c) The question of whether former judges should be eligible, and if so after what period, for subsequent appointments within the United Nations (see article 4, paragraph 6, of the draft statute of the Dispute Tribunal and article 3, paragraph 6, of the draft statute of the Appeals Tribunal);

(d) The question of the extent to which the Dispute Tribunal should have the power to order compensation, interest and costs (see article 10, paragraphs 5 (b), (c) and (d) and 6, of the draft statute of the Dispute Tribunal and article 9, paragraphs 1 (b), (c) and (d) and 2, of the draft statute of the Appeals Tribunal);

(e) The question of whether applications alleging non-observance of the regulations of the Pension Fund and applications filed against a specialized agency should be considered by the Dispute Tribunal (see article 2, paragraphs 9 and 10,

and article 7, paragraph 2, of the draft statute of the Appeals Tribunal and articles 2, paragraph 1 (a), and 6, paragraph 4, of the draft statute of the Dispute Tribunal);

(f) The question of whether the Appeals Tribunal may decide to grant compensation for procedural delay when it remands a case to the Dispute Tribunal (see article 9, paragraph 5, of the draft statute of the Appeals Tribunal).

Finally, the Sixth Committee has decided to recommend that the resolution by which the General Assembly will adopt the statutes of the Dispute Tribunal and the Appeals Tribunal should contain a paragraph drafted as follows: "*Affirms* that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes". The Sixth Committee further recommends that the resolution include language providing for a review of the statutes of the Tribunals by the General Assembly, after the entry into force, in the light of the experience gained with the operation of the new system of administration of justice.

It would be appreciated if the present letter, together with its enclosures, containing the draft statutes of the Dispute Tribunal and the Appeals Tribunal, could be brought to the attention of the Fifth Committee and be circulated as a document of the General Assembly under agenda item 129.

(*Signed*) Hamid **Al Bayati**
Chairman of the Sixth Committee

Enclosure 1

Draft statute of the United Nations Dispute Tribunal

Text proposed by the Working Group on Administration of Justice at the United Nations

Article 1

A tribunal is established by the present statute as the first instance of the two-tier formal system of administration of justice, to be known as the United Nations Dispute Tribunal.

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided in article 3, paragraph 1, of the present statute, against the Secretary-General, as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The words "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-observance **[, including the staff pension regulations]**;[1]

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by **[a staff member]**[2] requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal's decision on such an application shall not be subject to appeal.

[3. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by a staff association, as provided in article 3, paragraph 3, of the present statute, against the United Nations or separately administered United Nations funds and programmes to enforce the rights of staff associations, as recognized under the Staff Regulations and Rules.][3]

4. The Dispute Tribunal shall be competent to permit or deny leave to an application to file a friend-of-the-court brief by a staff association.

---

[1] See article 2, paragraph 9, of the statute of the Appeals Tribunal and the note thereto.

[2] See article 3, paragraph 1 (d), below and the note thereto.

[3] A proposal was made to delete this paragraph. For consideration by the Fifth Committee.

5. The Tribunal shall be competent to permit **[a staff member]**[4] who is entitled to appeal the same administrative decision under article 2, paragraph 1 (a), to intervene in a matter brought by another staff member under article 2, paragraph 1 (a).

6. In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Tribunal shall decide on the matter.

[7. As a transitional measure, the Dispute Tribunal shall have jurisdiction over: (a) a case transferred to it on 1 January 2009 from a joint appeals board or a joint disciplinary committee established by the United Nations or from another similar body established by a separately administered fund or programme; and (b) an application filed with the United Nations Administrative Tribunal before 1 January 2009, that has not been reviewed by the Administrative Tribunal as of 31 December 2008.][5]

Article 3

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes.

[(d) Any person performing work by way of his or her own personal service for the United Nations Secretariat or separately administered United Nations funds and programmes, no matter the type of contract by which he or she is engaged, with the exception of persons in the following categories:

(i) Military or police personnel in peacekeeping operations;

(ii) Volunteers (other than United Nations Volunteers);

(iii) Interns;

(iv) Type II gratis personnel (personnel provided to the United Nations by a Government or other entity responsible for the remuneration of the services of such personnel and who do not serve under any other established regime); or

(v) Persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm.][6]

---

[4] See article 3, paragraph 1 (d), below and the note thereto.

[5] Owing to the budgetary implications of the transitional measures, delegations had requested that options be developed to guide future discussions on this issue; see options paper in appendix I.

[6] See options paper in appendix II.

2. A request for a suspension of action under article 2, paragraph 2, of the present statute may be filed by an individual, as provided in article 3, paragraph 1, of the present statute.

[3. An application under article 2, paragraph 3, of the present statute may be filed by a staff association recognized under United Nations staff regulation 8.1 (b).][7]

Article 4

1. The Dispute Tribunal shall be composed of three full-time judges and two half-time judges.

2. The judges shall be elected by the General Assembly on the recommendation of the Internal Justice Council in accordance with General Assembly resolution 62/228. No two judges shall be of the same nationality. Due regard shall be given to geographical distribution and gender balance.

3. To be eligible for appointment as a judge, a person shall:

(a) Be of high moral character; and

(b) Possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

4. A judge of the Dispute Tribunal shall be appointed for one non-renewable term of seven years. As a transitional measure, two of the judges (one full-time judge and one half-time judge) initially appointed, to be determined by drawing of lots, shall serve three years and may be reappointed to the same Dispute Tribunal for a further non-renewable term of seven years. A current or former judge of the Appeals Tribunal shall not be eligible to serve in the Dispute Tribunal.

5. A judge of the Dispute Tribunal appointed to replace a judge whose term of office has not expired shall hold office for the remainder of his or her predecessor's term, and may be reappointed for one non-renewable term of seven years, provided that the unexpired term is less than three years.

[6. A former judge of the Dispute Tribunal shall not be eligible for any subsequent appointment within the United Nations, except another judicial post.][8]

7. The Dispute Tribunal shall elect a President.

8. A judge of the Dispute Tribunal shall serve in his or her personal capacity and enjoy full independence.

9. A judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Tribunal.

10. A judge of the Dispute Tribunal may only be removed by the General Assembly in case of misconduct or incapacity.

---

[7] See article 2, paragraph 3, above and the note thereto.

[8] A proposal was made for a former judge to be eligible, after a certain period, for a post for which the selection and election and/or appointment is the prerogative of the United Nations Secretary-General. However, there were differing views on how long that ineligibility period should be. See also article 3, paragraph 6, of the statute of the Appeals Tribunal.

11. A judge of the Dispute Tribunal may resign, by notifying the General Assembly through the Secretary-General. The resignation shall take effect from the date of notification, unless the notice of resignation specifies a later date.

Article 5

The three full-time judges of the Dispute Tribunal shall normally perform their functions in New York, Geneva and Nairobi, respectively. The Dispute Tribunal may decide to hold sessions in other duty stations, as required by the caseload.

Article 6

1. The Secretary-General of the United Nations shall make the administrative arrangements necessary for the functioning of the Dispute Tribunal, including provisions for the travel and related costs of staff whose physical presence before the Tribunal is deemed necessary by the Tribunal and for judges to travel as necessary to hold sessions at other duty stations.

2. The Registries of the Dispute Tribunal shall be established in New York, Geneva and Nairobi, each consisting of a Registrar and such other staff, as necessary.

3. The expenses of the Dispute Tribunal shall be borne by the United Nations.

4. Compensation ordered by the Dispute Tribunal shall be paid by the United Nations Secretariat or separately administered United Nations funds and programmes, as applicable and appropriate **[or, by the specialized agency, organization or entity that has accepted the jurisdiction of the Dispute Tribunal].**[9]

Article 7

1. Subject to the provisions of the present statute, the Dispute Tribunal shall establish its own rules of procedure, which shall be subject to approval by the General Assembly.

2. The rules shall include provisions concerning:

(a) Organization of work;

(b) Presentation of submissions and the procedure to be followed in respect thereto;

(c) Procedures for maintaining the confidentiality and inadmissibility of verbal or written statements made during the mediation process;

(d) Intervention by persons not party to the case whose rights may be affected by the judgement;

(e) Oral hearings;

(f) Publication of judgements;

(g) Functions of the Registries;

(h) Procedure for summary dismissal;

[9] See article 2, paragraphs 9 and 10, of the statute of the Appeals Tribunal and the note thereto.

(i) Evidentiary procedure;

(j) Suspension of contested administrative decisions;

(k) Procedure for the recusal of judges;

(l) Other matters relating to the functioning of the Dispute Tribunal.

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following applicable deadline:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days after the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days after the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

(ii) In cases where a management evaluation of the contested decision is not required, within 90 calendar days after the applicant's receipt of the administrative decision;

(iii) The deadline provided for in subparagraphs (i) and (ii) above shall be extended to one year if the application is filed by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including of the United Nations Secretariat or separately administered United Nations funds and programmes;

(iv) Where the parties have sought mediation of their dispute within the deadline for the filing of an application under article 8, paragraph 1 (d), but did not reach an agreement, the application shall be receivable if filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

2. An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 days after the last day for the implementation as specified in the

mediation agreement or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement.

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding article 8, paragraph 3, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

5. The filing of an application shall not have the effect of suspending the implementation of the contested administrative decision.

6. An application and other submissions shall be filed in any of the official languages of the United Nations.

[7. As a transitional measure, a case transferred on 1 January 2009 pursuant to article 2, paragraph 7, of the present statute must also satisfy deadlines for transitional measures applicable to such cases to be provided separately by an administrative issuance.][10]

Article 9

1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.

2. The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

3. The oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed.

Article 10

1. The Dispute Tribunal may suspend proceedings in a case at the request of the parties for a time to be specified by it in writing.

2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

3. At any time during the deliberations, the Dispute Tribunal may propose to refer the case to mediation. With the consent of the parties, it shall suspend the proceedings for a time to be specified by it. If a mediation agreement is not reached

[10] Needed only if cases are transferred to the Dispute Tribunal; see article 2, paragraph 7, above and the note thereto.

within this period of time, the Dispute Tribunal shall continue with its proceedings unless the parties request otherwise.

4. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

5. As part of its judgement, the Dispute Tribunal may order one or more of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b);

[(b) Compensation, which shall not normally exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, order the payment of a higher indemnity in exceptional cases and shall provide the reasons for that decision;

(c) Interest; or

(d) Costs.][11]

---

[11] While the outstanding issues contained in article 10 of the statute of the Dispute Tribunal and article 9 of the statute of the Appeals Tribunal relate to financial matters that will be addressed by the Fifth Committee, they also give rise to important legal considerations relating to access to justice, equality of arms and the adequacy of remedies.

It is important to strike a balance between these legal considerations, on the one hand, and, on the other hand, incentives and disincentives for filing and prolonging frivolous suits, the likelihood of informal resolution of disputes, and the efficiency and even-handedness of the process, in addition to the financial implications for the new system. In striking this balance, consideration should also be given to the role of the Office of Staff Legal Assistance, in particular the scope of assistance offered.

During the consultation there was support of the text as proposed by the Secretariat. It was also proposed to amend subparagraph (b) (to introduce a cap of three years' net base salary on compensation) and to delete the provisions concerning interests and costs.

The Secretariat's proposal on compensation builds upon the current system, in which a cap exists on compensation (2 years' net base salary) but provides that in exceptional circumstances that cap can be raised. This is provided in article 10 of the current statute of the United Nations Administrative Tribunal. Regarding interest and costs, it was noted that these would be new elements under the new system of administration of justice, but, under certain circumstances, are awarded by international administrative tribunals.

Delegations recommended that these considerations be taken into account when the final decision on article 10 of the statute of the Dispute Tribunal and 9 of the statute of the Appeals Tribunal is taken.

[6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before the Tribunal, it may award costs against that party.][12]

7. The Dispute Tribunal shall not award exemplary or punitive damages.

8. The Dispute Tribunal may refer appropriate cases to the Secretary-General or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

9. Cases before the Dispute Tribunal shall normally be considered by a single judge. However, the President of the Appeals Tribunal may, within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal when necessary by reason of the particular complexity or importance of the case. Cases referred to a panel of three judges shall be decided by a majority vote.

Article 11

1. The judgements of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based.

2. The deliberations of the Dispute Tribunal shall be confidential.

3. The judgement of the Dispute Tribunal shall be binding upon the parties, but is subject to appeal in accordance with the statute of the Appeals Tribunal. In the absence of such appeal, it shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal.

4. The judgements of the Dispute Tribunal shall be drawn up in any of the six official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.

5. A copy of the judgement shall be communicated to each party in the case. The applicant shall receive a copy in the language in which the application was submitted unless he or she requests a copy in another of the official languages of the United Nations.

6. The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.

Article 12

1. Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement.

2. Clerical or arithmetical mistakes, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Dispute Tribunal, either on its own motion or on the application of any of the parties.

---

[12] See article 10, paragraph 5, above and the note thereto.

3. Either party may apply to the Dispute Tribunal for an interpretation of the meaning or the scope of the final judgement, provided that it is not under consideration by the Appeals Tribunal.

4. Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.

Article 13

The present statute may be amended by decision of the General Assembly.

Appendix I

Transition to the new formal system of administration of justice (article 2, paragraph 7, of the draft statute of the United Nations Dispute Tribunal)

Options for further consideration by the Fifth Committee

Based on the expectation that on 31 December 2008 not all cases filed under the current system of administration of justice will have been resolved, the statute of the United Nations Dispute Tribunal must contain provisions on the transition to the new formal system (i.e., provisions on the eventual transfer of cases having arisen before that date to the jurisdiction of the Dispute Tribunal).

As the number of unresolved cases on 31 December 2008[a] depends on the capacity of, and resources being made available for that purpose to, the existing structures to finalize cases filed in 2008, the Sixth Committee submits to the Fifth Committee the considerations and options presented below.

1. The Sixth Committee is of the view that any arrangement concerning the transition of cases arising before 1 January 2009 from the current system of administration of justice to the new formal system should take into account the need to reduce, as much as possible and feasible, any overlap between the two systems, while at the same time ensuring that all staff members are able to challenge contested decisions effectively and receive appropriate formal resolution of such claims within a reasonable time.

2. To avoid uncertainties, a clear rule needs to be established for handling cases that have already been submitted to review before 31 December 2008, for the purpose of ensuring an efficient review process that avoids, as much as feasible, the duplication of work performed by the different bodies under the old and the new system. Such a clear rule would also inform staff members of their rights and responsibilities in contesting an administrative decision; it should not, however, draw categorical distinctions between certain *types* of cases so as to avoid a perception of inequality. The decision as to whether a matter that arises before 31 December 2008 should be transferred to the new system should therefore depend on the actual *stage* that the review process initiated by the staff member has reached.

3. To achieve that goal, several options ought to be considered:

Option 1. Article 2, paragraph 7, on transitional measures as proposed by the Secretariat would allow the **Joint Appeals Boards and the Joint Disciplinary Committees and the current United Nations Administrative Tribunal to transfer cases pending before them to the new United Nations Dispute Tribunal after 1 January 2009**, the date at which the new formal system will come into existence. As the Dispute Tribunal does not have any conditions attached to it and does not place any restrictions on the possibility for transfer, the Boards, Committees and United Nations Administrative Tribunal could — consonant with

[a] On the measures to address the backlog, see paragraphs 9 and 10 of the report of the Secretary-General contained in document A/63/314.

the decision by the General Assembly to discontinue the old system on 31 December 2008 — **transfer all cases pending before them to the new system**.

While the **advantage** of this solution would be to allow for a clear cut between the two systems, the **disadvantage** would be that — if the number of "old" cases transferred to the new system is large — the new Dispute Tribunal would be confronted with a high number of unresolved cases "as of day one" of its operation, which may clog the system from the very outset.

Option 2. According to another proposal, **after 1 January 2009** all claims shall be submitted under the new system **except those already "pending action before the United Nations Administrative Tribunal or the Joint Appeals Boards and Joint Disciplinary Committees as of 31 December 2008"**. This would open the jurisdiction of the Dispute Tribunal for cases arising after 1 January 2009, whereas all cases which at that date are already "pending action" before the United Nations Administrative Tribunal or the Boards and Committees would be excluded from the jurisdiction of the Dispute Tribunal and would have to be concluded under the old system. As a consequence, the system of Joint Appeals Boards, Joint Disciplinary Committees and the United Nations Administrative Tribunal would need to exist beyond 31 December 2008 for the time needed by them to conclude their work on those "pending" cases.

4. Which cases exactly would still have to be concluded under the old system, however, depends on how the term "pending action before the Joint Appeals Boards and Joint Disciplinary Committees or the United Nations Administrative Tribunal" is being defined. This term can **refer to very different stages of the proceedings** before those bodies. So, here again, a **number of options** come into play, each of which leads to a different number of cases to be continued under the old system while forwarding the remaining cases as of 1 January 2009 to the new system, as follows:

Option (a): pending = filing of a case

Under this option, a case should continue to be processed under the old system once a **complaint has been filed before a Joint Appeals Board, a Joint Disciplinary Committee or the United Nations Administrative Tribunal**, the argument being that after a case has been formally submitted to one of the existing bodies, that body should conduct and conclude the proceedings as provided for in the current system. The disadvantage is that probably a large number of cases would need to be completed under the old system long into 2009 or even beyond.

Option (b): pending = a Joint Appeals Board or a Joint Disciplinary Committee has been formed

Under this option, a case should continue to be processed under the old system **if the respective Joint Appeals Board or Joint Disciplinary Committee has already been constituted at the request of the applicant**, the argument being that at this point at least some preparatory effort — selection of the persons to serve on the respective Board or Committee — has already been invested in the case so that that body should actually take up and conclude its work on the case.

Option (c): pending = a Joint Appeals Board or a Joint Disciplinary Committee has started to work on the case

Under this option, a case should continue under the old system only if the respective **body has actually started its work**, the argument being that there will always be some lapse of time between the formation of the Joint Appeals Board or Joint Disciplinary Committee and the date when the respective body will take up consideration of the case. If the Board or Committee has been established but has not yet started to work on the case, the case could still be resubmitted under the new system without causing too much duplication of work.

Option (d): pending = pleadings phase has been concluded

Under this option, a case should stay in the old system once the respective body has **concluded the "pleadings" phase**, i.e. after all documents have been submitted, oral hearings have been held and presentations have been made. A case that has reached this advanced stage of deliberation should no longer be transferred out of the system, the argument being that requiring the new Dispute Tribunal to "rehear" all of this and to start at the beginning would be a duplication of work and a waste of resources and would not be in the interest of justice.

Option (e): pending = any stage of the proceedings before the decision of a Joint Appeals Board or Joint Disciplinary Committee is rendered

If it were decided that it is the decision or recommendation by the Joint Appeals Board, Joint Disciplinary Committee or United Nations Administrative Tribunal that counts, a case could still be forwarded to the new system **as long as the respective body has not actually rendered its decision**. The disadvantage of this option would be that almost all of the substantive work of the Board, Committee or Administrative Tribunal would have to be repeated by the new Dispute Tribunal or Appeals Tribunal.

Appendix II

Scope *ratione personae* of the new system (article 3, paragraph 1 (d), of the draft statute of the United Nations Dispute Tribunal)

Options for further consideration by the Fifth Committee

Option 1

Set up the United Nations Dispute Tribunal for United Nations staff as currently covered by the system (article 3, paragraph 1 (a) to (c) of the draft statute) as of 1 January 2009 and establish, for all other categories proposed by the Secretary-General or Member States, a mechanism of the General Assembly for further work (step-by-step approach), which could be:

Option (a): the working group of the Sixth Committee on the Administration of Justice at the United Nations;

Option (b): an Ad Hoc Committee

to take up work:

Option (c): during the sixty-third session of the General Assembly;

Option (d): at the sixty-fourth session or after, once the United Nations Dispute Tribunal is up and running and experience has been gained,

with a mandate to assess the means available to other persons working for the United Nations and to look into possibilities to improve the remedies available to them through:

Option (e): as a first step, alternative or informal mechanisms;

Option (f): alternative or informal mechanisms and, provided that the body established under options (a) or (b) above concludes that these are insufficient, inclusion in the formal system;

Option (g): alternative mechanisms, as well as the inclusion of any of the additional categories proposed by the Secretary-General or Member States under the new formal system,

based on:

Option (h): the information contained in the note by the Secretary-General;

Option (i): an additional report of the Secretary-General to be requested on possible ways to improve their means of addressing grievances through informal mechanisms.

Option 2

Set up the United Nations Dispute Tribunal for United Nations staff and other categories of non-staff personnel mentioned in paragraph 1 (d) of article 3 of the draft statute and for those proposed by delegations, bearing in mind the following positions expressed by different delegations:

Option (a): Accept article 3, paragraph 1 (d) as is;

Option (b): Accept the types of persons mentioned in the chapeau of article 3, paragraph 1 (d), but include also the categories mentioned in article 3, paragraph 1 (d) (ii) to (iv), i.e. volunteers (other than United Nations Volunteers), interns and type II gratis personnel, in the scope of the new system;

Option (c): Further improvement of redress for non-staff needs to be considered: to be decided later;

Option (d): Replace the categories listed in article 3, paragraph 1 (d) by:

- officials other than staff of the Secretariat;
- experts on mission who do not serve under a contract as a consultant or individual contractors;

Option (e): No extension of the current scope of the new system beyond the personnel listed in article 3, paragraph 1 (a) to (c) now, with continuation of the debate at a later stage (see above, option 1), once the new system is up and running and sufficient experience has been gained.

Option 3

As a first step, the new formal system of administration of justice as of 1 January 2009 shall, as a minimum, apply to the persons covered by the present system, which are listed in article 3, paragraph 1 (a) to (c) of the draft statute of the United Nations Dispute Tribunal.

As a next step, the Working Group of the Sixth Committee on the Administration of Justice to be established during the sixty-third session of the General Assembly shall continue to discuss other legal aspects of the administration of justice at the United Nations with a view to ensuring that effective remedies are available to all other categories of United Nations personnel and to consider the types of recourse that are the most appropriate to that end.

Enclosure 2

Draft statute of the United Nations Appeals Tribunal

Text proposed by the Working Group on the Administration of Justice at the United Nations

Article 1

A tribunal is established by the present statute as the second instance of the two-tier formal system of administration of justice, to be known as the United Nations Appeals Tribunal.

Article 2

1. The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

(a) Exceeded its jurisdiction or competence;

(b) Failed to exercise jurisdiction vested in it;

(c) Erred on a question of law;

(d) Committed an error in procedure, such as to affect the decision of the case; or

(e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

2. An appeal may be filed by either party (i.e. the applicant, or a person making claims in the name of an incapacitated or deceased applicant, or the respondent) to a judgement of the Dispute Tribunal.

3. The Appeals Tribunal may affirm, reverse, modify or remand the judgement of the Dispute Tribunal. It may also issue all orders necessary or appropriate in aid of its jurisdiction and consonant with this statute.

4. In cases of appeal under article 2, paragraph 1 (e), the Appeals Tribunal shall be competent to:

(a) Affirm, reverse or modify findings of fact of the Dispute Tribunal on the basis of substantial evidence in the written record; or

(b) Remand the case to the Dispute Tribunal for additional factual findings, subject to article 2, paragraph 5, if it determines that further findings of fact are necessary.

5. In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

6. Where the Appeals Tribunal remands a case to the Dispute Tribunal, it may order that the case be considered by a different judge of the Dispute Tribunal.

7. For the purposes of this article, "written record" means anything that has been entered in the formal record of the Dispute Tribunal including submissions, evidence, testimony, motions, objections, rulings and the judgement, and any evidence received in accordance with article 2, paragraph 5, of the present statute.

8. In the event of a dispute as to whether the Appeals Tribunal has competence under the present statute, the Tribunal shall decide on the matter.

[9. The Appeals Tribunal shall be competent to hear and pass judgement on an application alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund arising out of the decision of the United Nations Joint Staff Pension Board submitted by:

(a) Any staff member of a member organization of the Pension Fund which has accepted the jurisdiction of the Appeals Tribunal in Pension Fund cases who is eligible under article 21 of the regulations of the Fund as a participant in the Fund, even if his or her employment has ceased, and any person who has acceded to such staff member's rights upon his or her death;

(b) Any other person who can show that he or she is entitled to rights under the regulations of the Pension Fund by virtue of the participation in the Fund of a staff member of such member organization.[1]

10. The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the Appeals Tribunal's jurisdiction, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal.][1]

Article 3

1. The Appeals Tribunal shall be composed of seven judges.

2. The judges shall be elected by the General Assembly on the recommendation of the Internal Justice Council in accordance with General Assembly resolution

[1] It was proposed that applications alleging non-observance of the regulations of the Pension Fund and applications filed against a specialized agency should be considered by the Dispute Tribunal. It is recommended that, before a decision is taken, the Secretariat be given an opportunity to assess the consequences of this proposal, in consultation with the entities concerned as appropriate.

62/228. No two judges shall be of the same nationality. Due regard shall be given to geographical distribution and gender balance.

3. To be eligible for appointment as a judge, a person shall:

(a) Be of high moral character; and

(b) Possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

4. A judge of the Appeals Tribunal shall be appointed for one non-renewable term of seven years. As a transitional measure, three of the judges initially appointed, to be determined by drawing of lots, shall serve three years and may be reappointed to the same Appeals Tribunal for a further non-renewable term of seven years. A current or former judge of the Dispute Tribunal shall not be eligible to serve in the Appeals Tribunal.

5. A judge of the Appeals Tribunal appointed to replace a judge whose term of office has not expired shall hold office for the remainder of his or her predecessor's term, and may be reappointed for one non-renewable term of seven years, provided that the unexpired term is less than three years.

[6. A judge of the Appeals Tribunal shall not be eligible for any appointment within the United Nations, except another judicial post.][2]

7. The Appeals Tribunal shall elect a President and two Vice-Presidents.

8. A judge of the Appeals Tribunal shall serve in his or her personal capacity and enjoy full independence.

9. A judge of the Appeals Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Tribunal.

10. A judge of the Appeals Tribunal may only be removed by the General Assembly in case of misconduct or incapacity.

11. A judge of the Appeals Tribunal may resign, by notifying the General Assembly through the Secretary-General. The resignation shall take effect from the date of notification, unless the notice of resignation specifies a later date.

Article 4

1. The Appeals Tribunal shall perform its functions in New York. However, it may decide to hold sessions in Geneva or Nairobi as required by its caseload.

2. The Appeals Tribunal shall hold ordinary sessions at dates to be fixed by its rules, subject to the determination of the President that there is a sufficient number of cases to justify holding the session.

3. Extraordinary sessions may be convoked by the President, as required by the caseload.

---

[2] A proposal was made for a former judge to be eligible, after a certain period, for a post for which the selection and election and/or appointment is the prerogative of the United Nations Secretary-General. However, there were differing views on how long that ineligibility period should be. See also article 4, paragraph 6, of the statute of the Dispute Tribunal.

Article 5

1. The Secretary-General shall make the administrative arrangements necessary for the functioning of the Appeals Tribunal, including provisions for the travel and related costs of staff whose physical presence before the Tribunal is deemed necessary by the Tribunal and for judges to travel as necessary to hold sessions in Geneva and Nairobi.

2. The Registry of the Appeals Tribunal shall be established in New York, consisting of a Registrar and such other staff as necessary.

3. The expenses of the Appeals Tribunal shall be borne by the United Nations.

4. Compensation ordered by the Appeals Tribunal shall be paid by the United Nations Secretariat or separately administered United Nations funds and programmes as applicable and appropriate, or by the specialized agency, organization or entity that has accepted the jurisdiction of the Appeals Tribunal.

Article 6

1. Subject to the provisions of the present statute, the Appeals Tribunal shall establish its own rules of procedure, which shall be subject to approval by the General Assembly.

2. The rules shall include provisions concerning:

(a) Election of the President and Vice-Presidents;

(b) Composition of the Tribunal for its sessions;

(c) Organization of work;

(d) Presentation of submissions and the procedure to be followed in respect thereto;

(e) Procedures for maintaining the confidentiality and inadmissibility of verbal or written statements made during the mediation process;

(f) Intervention by persons not party to the case whose rights may have been affected by the judgement of the Dispute Tribunal and whose rights might therefore also be affected by the judgement of the Appeals Tribunal;

(g) The filing of friend-of-court briefs, upon motion and with the permission of the Appeals Tribunal;

(h) Oral proceedings;

(i) Publication of judgements;

(j) Functions of the Registry;

(k) Procedure for the recusal of judges; and

(l) Other matters relating to the functioning of the Tribunal.

Article 7

1. An appeal shall be receivable if:

(a) The Appeals Tribunal is competent to hear and pass judgement on the appeal, pursuant to article 2, paragraph 1, of the present statute;

(b) The appellant is eligible to file the appeal, pursuant to article 2, paragraph 2, of the present statute; and

(c) The appeal is filed within forty-five days of the receipt of the judgement of the Dispute Tribunal or, where the Appeals Tribunal has decided to waive or suspend that deadline in accordance with paragraph 3 below, within the period specified by the Appeals Tribunal.

[2. For purposes of applications alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund arising out of a decision of the United Nations Joint Staff Pension Board, an application shall be receivable if filed within ninety days from the receipt of the Board's decision.][3]

3. The Appeals Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Appeals Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding article 7, paragraph 3, an application shall not be receivable if it is filed more than one year after the judgement of the Dispute Tribunal.

5. The filing of appeals shall have the effect of suspending the execution of the judgement contested.

6. An appeal and other submissions shall be filed in any of the official languages of the United Nations.

Article 8

1. The Appeals Tribunal may order production of documents or such other evidence as it deems necessary, subject to article 2 of the present statute.

2. The Appeals Tribunal shall decide whether the personal appearance of the appellant or any other person is required at oral proceedings and the appropriate means to achieve that purpose.

3. The judges assigned to a case will determine whether to hold oral proceedings.

4. The oral proceedings of the Appeals Tribunal shall be held in public unless the Appeals Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed.

Article 9

1. The Appeals Tribunal may order one or more of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an

[3] See article 2, paragraph 9, above and the note thereto.

amount of compensation that the respondent may elect to pay as an alternative to the recission of the contested administrative decision or specific performance ordered, subject to subparagraph (b);

[(b) Compensation;

(c) Interest; or

(d) Costs.][4]

[2. Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party.][5]

3. The Appeals Tribunal shall not award exemplary or punitive damages.

4. At any time during the proceedings, the Appeals Tribunal may order an interim measure to provide temporary relief to either party to prevent irreparable harm and to maintain consistency with the judgement of the Dispute Tribunal.

[5. Where the Appeals Tribunal decides to remand a case to the Dispute Tribunal pursuant to article 2, it may also decide to grant compensation for the procedural delay, which is not to exceed the equivalent of three months' net base salary.][6]

6. The Appeals Tribunal may refer appropriate cases to the Secretary-General or executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

Article 10

1. Cases before the Appeals Tribunal shall normally be reviewed by a panel of three judges and shall be decided by a majority vote.

2. Where the President or any two judges sitting in a particular case consider that the case raises a significant question of law, at any time before judgement is rendered, the case may be referred for consideration by the whole Appeals Tribunal. Quorum in such cases shall be five judges.

3. The judgements of the Appeals Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based.

4. The deliberations of the Appeals Tribunal shall be confidential.

5. The judgements of the Appeals Tribunal shall be binding upon the parties.

6. The judgements of the Appeals Tribunal shall be final and without appeal, subject to the provisions of article 11 of the present statute.

7. The judgements of the Appeals Tribunal shall be drawn up in any of the official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.

---

[4] See article 10, paragraph 5 (b), (c) and (d) of the statute of the Dispute Tribunal and the note thereto.

[5] See article 10, paragraph 6 of the statute of the Dispute Tribunal and note thereto.

[6] For consideration by the Fifth Committee.

8. A copy of the judgement shall be communicated to each party in the case. The applicant shall receive a copy in the language in which the appeal was submitted unless he or she requests a copy in another of the official languages of the United Nations.

9. The judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.

Article 11

1. Subject to article 2, either party may apply to the Appeals Tribunal for a revision of a judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Appeals Tribunal and to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement.

2. Clerical or arithmetical mistakes, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Appeals Tribunal either on its own motion or on the application of any of the parties.

3. Either party may apply to the Appeals Tribunal for an interpretation of the meaning or scope of the judgement.

4. Where the judgement requires execution within a certain period of time and such execution has not been carried out, either party may apply to the Appeals Tribunal for an order for execution of the judgement.

Article 12

The present statute may be amended by decision of the General Assembly.